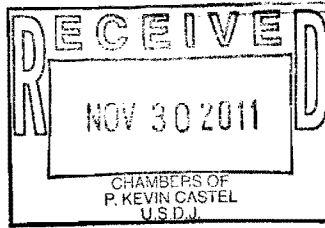


MEMO ENDORSED

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: <u>11-30-11</u>

November 29, 2011



919 Third Avenue
 New York, NY 10022
 Tel 212 909 6000
 www.debevoise.com

David H. Bernstein
 Partner
 Tel 212 909 6696
 Fax 212 521 7696
 dhbernstein@debevoise.com

BY HAND

The Honorable P. Kevin Castel
 United States District Judge
 Daniel Patrick Moynihan United States Courthouse
 500 Pearl Street
 New York, New York 10007-1312

Conference adjourned
 to: January 27, 2012 at 10:30am
 from: December 6, 2011
SO ORDERED:

 P. KEVIN CASTEL, U.S.D.J.

Bayer HealthCare LLC v. Cipla Ltd., 11 Civ. 6347 (PKC)

11-30-11

Dear Judge Castel:

We represent plaintiff ("Bayer") in the above-referenced action. We write pursuant to the Court's September 15, 2011 Order to advise the Court on the status of the action and seek an adjournment of the initial pretrial conference scheduled for December 6, 2011 at 10:30 a.m.

As Your Honor knows, Bayer filed this action on September 12, 2011 against Cipla, Ltd. ("Cipla") and various website operators, including Veritas Pharma Pte. Ltd. d/b/a OTC Pet Meds ("OTC Pet Meds"), Ronin Ventures Pte. Ptd. d/b/a Trusted Pet Meds ("Trusted Pet Meds"), OKPet.com, Archipelago Suppliers Pty Ltd. d/b/a Freedom-Pharmacy.com and USAPharmacypills.com ("Archipelago"), and HealthyChoicePharmacy.com Inc. d/b/a The Pharmacy Express ("The Pharmacy Express") (collectively, the "Website Defendants"). Bayer alleges that Cipla has manufactured a flea and tick preventative for dogs called DA DOUBLE ADVANTAGE, which counterfeits and infringes Bayer's ADVANTAGE[®] trademark. Bayer alleges that the Website Defendants counterfeited, infringed and diluted Bayer's ADVANTAGE[®] mark under U.S. federal and state law by selling DA DOUBLE ADVANTAGE; engaged in false advertising by marketing DA DOUBLE ADVANTAGE as equivalent to Bayer's K9 ADVANTIX[®] II; and violated Bayer's trademark rights by selling gray market ADVANTIX[®] into the United States.

On September 14, 2011, Bayer filed a motion for a preliminary injunction against the defendants. On November 2, 2011, Bayer requested that this Court enter a preliminary injunction against OTC Pet Meds, Trusted Pet Meds and OKPet.com because those parties had not responded to Bayer's motion and had not engaged in any settlement

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discussions with Bayer. This Court granted Bayer's motion for a preliminary injunction as to those defendants on November 3, 2011.

On November 3, 2011, Bayer filed an amended complaint naming Sava Medicare Ltd. ("Sava") as an additional defendant and alleging that Sava, acting as a wholesaler, shipped both DA DOUBLE ADVANTAGE and gray market ADVANTIX[®] products into the United States. The amended complaint also included additional allegations about the illegal importation of gray market ADVANTIX[®] by three defendants—OTC Pet Meds, Trusted Pet Meds and OKPet.com.

As of this date, none of the defendants have filed or served any pleadings or motion papers in response to Bayer's complaint or motion for preliminary injunction. The current status of the action as to each of the defendants is as follows:

- Bayer and defendant Cipla have entered into a settlement agreement. On November 7, 2011, Bayer filed a Notice of Voluntary Dismissal of Cipla, which the Court approved on November 8.
- Bayer and defendant Archipelago (which is the same entity as defendant The Pharmacy Express), have agreed on a proposed consent decree. A courtesy copy of that proposed consent decree is enclosed; we also have filed this proposed order with the clerk.
- Defendant OTC Pet Meds has stated in correspondence with Bayer's counsel, "Bayer as well as USA jurisdiction are not authorized to force us legally [sic]." OTC Pet Meds has not made an appearance in this case and has refused to engage in settlement negotiations. Defendants Trusted Pet Meds and OKPet.com have not responded in any way to this lawsuit, nor have they made an appearance. The clerk entered certificates of default as to these three defendants on November 23, 2011. Bayer expects to file a motion for default judgment against these three defendants in the coming days.
- Bayer has communicated with Sava's U.S. counsel, Steven Lieberman and Leo Loughlin of Rothwell, Figg, Ernst & Manbeck, P.C. Sava is domiciled in Mauritius, and has not agreed to authorize its counsel to accept service of the summons and amended complaint. Bayer is currently seeking to serve Sava under Mauritian law pursuant to Rule 4(2)(A). Bayer also is engaged in settlement discussions with Sava's counsel. Should these discussions fail, however, Bayer expects to move for a preliminary injunction against Sava after it has been served.

Under these circumstances, Bayer does not believe that there are any matters that require the Court's attention and thus requests an adjournment of the December 6 conference. In light of the time that it may take Bayer to effectuate service, and my unavailability in the first part of January, we respectfully request an adjournment for a date after January 10, 2012. Bayer has made no previous requests for adjournment of this

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conference date. If the Court nevertheless would like Bayer's and Sava's counsel to appear on December 6 to address any pretrial matters, we are of course willing to do so.

Thank you for your attention to this matter.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'David H. Bernstein', with a stylized flourish at the end.

David H. Bernstein

Enclosure

cc: Parties on attached service list

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Service List

Nick Setty
Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111-4109
nsetty@sheppardmullin.com
Counsel for Cipla, Ltd.

Steven Lieberman
Rothwell, Figg, Ernst & Manbeck, P.C.
1425 K Street, N.W.
Suite 800
Washington, DC 20005
slieberm@rothwellfigg.com
Counsel for Sava Medicare, Ltd.

Mark O'Reilly
O'Reilly Lillicrap Solicitors
848 Old Cleveland Road, Carina Qld 4152
Australia
moreilly@lawaust.com
Counsel for Archipelago Suppliers Pty Ltd.

Veritas Pharma Pte. Ltd., d/b/a OTC Pet Meds
sales@otcvetmeds.com

Ronin Ventures Pte. Ltd. d/b/a Trusted Pet Meds
sales@trustedpetmeds.com
support@trustedpetmeds.com

OKPet.com
info@okpet.com
techsupport@okpet.com